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Geoff Gray
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Criminal Law Branch
Attorney General's Department
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BARTON ACT 2600

Emailed to: aml.reform@ag.gov.au

Dear Mr Gray

Anti-Money Laundering and Counter-Terrorism Financing Bill 2005

Chartered Secretaries Australia (CSA) welcomes the opportunity to comment on the Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005.

CSA is the peak professional body delivering accredited education and the most practical and authoritative training and information on governance, as well as thought leadership in the field. We are an independent, widely respected influencer of governance thinking and behaviour in Australia. We represent over 8,500 governance professionals working in public and private companies, all of whom are involved in corporate administration. We have drawn on their experience in the formulation of this submission.

In preparing this submission, CSA has drawn on the expertise of the members of our national Corporate and Legal Issues Committee.

General comments

CSA recognises that closing the channels through which money intended to support terrorist activities could enter the Australian economy is essential. CSA also notes that Australia has entered into agreements on international anti-money laundering/terrorist financing (AML/CTF) standards and that to implement recommendations arising from those standards it intends to strengthen the present *Financial Transactions Reports Act 1988* and regulations.

However, CSA is concerned that the proposed new legislation, the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005 (the Bill), which seeks to bring additional businesses into a money laundering detection and prevention role, has been drafted in such a fashion that unintended consequences will result. Those unintended consequences will not achieve the policy objective of the legislation for the reasons set out on the following pages. They will also result in a substantial cost to business that is difficult to align with the Federal Government's stated intention to ensure that any new regulation achieves its objective without imposing burdensome costs on business.

A great deal of the detail will be built into the Regulations and the Rules and CSA notes that it is difficult to assess the full effect of the Bill until those Rules have been made available.

Below are outlined our main areas of concern. In addition, Appendix A lists each of the items that requested public comment included in the Bill and a short response from CSA.

Areas of concern

CSA has identified the following areas of concern:

(a) One regime for all: impact on small to medium-size enterprises

The draft Bill and Rules set out a series of requirements based on the designated transactions. By conceptualising a reporting entity based on a type of transaction, the range of entities caught under this legislation is vast. For example, it applies to a newsagent or pharmacy in a rural area that is an agent for one or more banks or Western Union travel agents who issue travellers cheques or stored value cards as well as major financial institutions.

Small businesses have taken on various agency arrangements to provide a range of financial services in rural and remote areas to replace services that used to be provided by banks. These small to medium-size enterprises (SMEs) will find it very difficult to meet the requirements of this legislation.

These are often small family businesses and they will be expected to comply with:

- the AML/CTF Bill, and
- the AML/CTF Regulations – no draft as yet, and
- the various AUSTRAC Rules and Guidance notes, some of which are yet to be issued,
- as well as put in place an AML/CTF program that requires review by an independent person.

It is not reasonable to impose these requirements on small businesses. There are criminal sanctions attached to a failure of compliance with the law. This may have the result of businesses deciding to withdraw from providing such services when they become aware of the requirements.

The extensive requirements of creating and conducting an AML/CTF program will be a real burden for business. The AML/CTF program will need to include the creation of a risk profile for every customer, monitoring customer's transactions for suspicious matters and training staff. In many instances, the systems and processes currently used are provided by the financial institution or company for which the SME is acting as agent. SME staff use the scripted process provided by the principal company and the transactions are recorded on the principal company systems.

In a manner similar to the introduction of the *Financial Services Reform Act* (FSR Act), many small businesses that had provided services in the past found they had training and other obligations far outweighing the benefits of fees earned for providing the impacted services.

To assist small businesses to meet the Australian Financial Services licensing requirements, the Australian Securities and Investments Commission (ASIC) issued a small business version of the policy statement covering organisational capacities. For some types of financial services, including basic banking products and general insurance, changes were made to the legislation or by ASIC Class Order to make it less onerous to have such agents acting for AFS licensees. The requirements under the AML/CTF legislation are more specific and failure does not result in being banned from operating in the industry, but can attract criminal and civil penalties for failure to comply.

CSA believes that consideration should be given to exempting SMEs from this first tranche where they are act as an agent for a financial institution, using the provided systems and processes. The authorising principal should be responsible for ensuring their systems and processes provide sufficient process to collect the required information to meet the aim of the legislation.

Careful consideration also needs to be given to the impact of designated transactions 44 to 47. These designated transactions would include those individuals who have established Self-Managed Superannuation Funds (SMSF) and are the trustees of their own funds and for members of their family. These persons do not carry out functions for the general public, but only for members of their SMSF. Was the capture of such persons intended where access to the funds is restricted and subject to existing regulation and supervision?

(b) *Issuing, acquiring or disposing of securities in the course of carrying on a business*

CSA requests clarification of this designated transaction. Is a listed entity considered to be issuing, acquiring or disposing of securities when it deals with its own shares?

Listed public companies and unlisted companies limited by shares can deal in shares in their companies when raising funds by a new offer, issuing shares under a Dividend Reinvestment Program, offering additional shares under a Share Purchase Plan or disposing of shares in a Share Buy-Back arrangement.

Some of Australia's large listed companies have share registers with hundreds of thousands of shareholders. To identify each one when the actual details of shareholders on any given day can change by the thousands is not reasonable. The sharebrokers dealing within a financial market can identify their clients; however, identifying existing shareholders would be extremely expensive. Indeed, CSA notes that any money laundering risk would be earlier in the stage of acquiring or disposing of shares (that is, with the sharebroker).

CSA recommends that Items 36 and 37 in section 6 be amended to provide that a company is not included in those provisions if it is undertaking activities with its own shares. CSA believes companies should be exempt on the basis that any money flowing either to the company or from the company will be via the banking system. As such, the account holders will have already been required to undertake the necessary identification process and the banking system participants will also have to implement the risk mitigation and suspicious activity reporting requirements. Accordingly, to require companies to also undertake these activities is unnecessary.

(c) No recognition of group structure and prohibition of information sharing across entities

The Exposure Draft of the Bill does not allow for efficiencies to be made by implementation of the legislation across a group structure. Many organisations consist of a number of related companies. These companies have processes in place to facilitate the use of common operational and technical systems, and risk management and compliance processes. This provides for monitoring, supervision and control from a central point as deemed most appropriate by the particular business.

The legislation requires each reporting entity to meet the various requirements. While a conglomerate may be able to develop a compliance program and then replicate it for each reporting entity, it does not appear to allow an organisation to develop an AML program as part of its overall risk management framework that can be shared by companies within the group structure. The outcome in real terms imposes an unsustainable burden on business, as businesses will neither be able to achieve economies of scale by rolling out an AML program to all companies within the group nor utilise the benefits of centres of excellence established within the group.

Each company within the group is expected to have its own AML program. This will involve substantial financial outlay and limits businesses from sharing expertise. This will be difficult enough for large businesses, but will have a devastating effect on SME groups. For example, where a small business such as a newsagent or pharmacy acts as an agent for one or more financial institutions to provide money transfer or banking facilities, the principal company would apparently not be able to provide the required AML/CTF compliance program, which would ensure a consistent approach throughout an agency network. Similarly, a franchise operation would not be able to provide the AML program as part of the franchise arrangements as each member of the franchise group is usually a separate legal entity. In addition, many organisations outsource functions and processes and the relationship to those outsourced service providers who are agents of the organisation is not clear.

Section 73 of the Bill requires a 'reporting entity' to develop an AML/CTF program. This wording implies that each reporting entity must develop a program. The mitigation of this requirement by section 34 (authorising another person to carry out the customer identification procedures) does not adequately address the problem of corporate groups because of the limited application of that section.

CSA believes that the important requirement of the legislation is that a person identified as undertaking a suspicious transaction must not be tipped off by any person.

CSA notes that it is more likely that suspicious transactions will fall through the cracks if entities within a group each have separate AML/CTF programs. Many groups have over-arching current risk management and compliance programs that could be adapted to include an AML/CTF program and ongoing AML/CTF monitoring activities. Such an over-arching AML/CTF program is more likely to achieve effective outcomes by reaching throughout the group or agent/franchise network.

CSA strongly recommends that the Bill be amended to allow corporate groups to take advantage of group efficiencies (for example, by using existing centres of excellence, specialist compliance departments, risk management departments and the like) to develop and conduct a single AML/CTF program on behalf of all entities within the corporate group. The amendment should also authorise a principal company with an agency network or a franchise group to be able to share AML/CTF programs to provide the level of support and expertise needed for SMEs. This should also apply to service providers acting as the agent of a reporting entity. This recommendation is subject, of course, to the requirements of the privacy legislation.

Following on from the above recommendation, there is a need to amend the tipping-off offence in section 95. That section makes it a criminal offence for a reporting entity to disclose to 'anyone else' the fact that a suspicion has been formed or that AUSTRAC has been notified. Clearly an offence in these terms is unworkable when a suspicious transaction is discovered within a corporate group. As stated above, these offences should be structured so as to recognise the criticality of not tipping off the 'suspicious person', rather than preventing groups from centralising support functions to achieve the full use of specific expertise and economy.

Those businesses that act as agent for another company or are within a franchise group would also benefit from a centralised expert support and compliance area. Consideration of tipping-off requirements needs to take such business arrangements into account, to gain the benefits of a consistent and well-structured AML/CTF compliance program.

The tipping-off provision should also be amended to allow a suspected transaction to be disclosed for the purpose of the reporting entity seeking expert external advice.

(d) Materiality test for non-compliance

The Exposure Draft is intended to be risk-based and principles-based legislation. However, in its current form, the Bill has no materiality test for non-compliance if an individual or company establishes an account that later turns out to be false.

The absence of a materiality test is antithetical to the alleged risk-based and principles-based approach of the legislation. CSA recommends consideration be given to establishing a short number of tests to determine whether a matter is material. These tests could be included in the Regulations or issued as part of the AUSTRAC Guidelines. Factors that could be considered include:

- the amount involved, and
- whether the customer is known to the service provider, and
- the number of accounts held, and
- whether the transaction is one of a number of similar transactions carried out over a short period of time such as one month, or where a pattern of activity is identified.

This test needs to be able to be easily understood and acted upon by any employee.

There is an irregularity in the Bill in the treatment of defences. CSA recommends that the Bill be reviewed to ensure that defences are provided in a consistent fashion, in particular, where criminal offences are proposed. CSA suggests that the business judgment rule in the *Corporations Act* is a good example of ensuring consistency of defence where criminal offences are proposed. A company should also be able to put forward a defence that it established a process that adequately addressed all the issues and achieved an ongoing effective AML/CTF monitoring and reporting process. A single failure of an adequate system should not result in penalties where negligence and/or dishonest conduct is not involved.

(e) Obligation to identify and materially mitigate the risk that provision of services in Australia will connect with an AML/CTF offence in another country and/or report suspicious transaction including matters relevant to investigations of offences in other countries

Section 74(b) combined with section 75(3) requires a reporting entity's AML/CTF program to identify and materially mitigate the risk of AML/CTF offences against the law of a foreign country. Similarly, section 39(1) combined with section 40(7) requires a reporting entity to report matters that may relate to proceeds of crime offences, CTF offences or investigations under the law of a foreign country.

CSA notes that it will be extraordinarily difficult for any SME to dedicate resources to identify and materially mitigate the risk that the provision of services in Australia will connect with an AML/CTF offence in another country, or to be in a position to identify matters that are relevant to investigations of offences in other countries.

For example, CSA notes that different subsidiaries supplying designated services in a small group, which do not have overseas operations of the Australian resident company, would not have the resources to meet the demands of these provisions.

CSA believes that, while it is incumbent on companies and individuals in Australia to comply with Australian law,, companies and individuals should not be held liable for an inability to identify and report on the activities of persons in other countries over whom they have no control.

CSA recommends that this provision not be included or that it be modified to ensure that individuals and companies are not held liable for the activities of persons in other countries.

(f) Identifying information on clients is required prior to business being undertaken

CSA notes that there are practical issues that need to be considered which will make this provision difficult to apply. Even where identification is allowed after the event, this is only in limited circumstances such as share trade transactions.

What level of identification will be required for a foreign person who wishes to send funds overseas? For those travelling in Australia, in rural areas the only businesses that provide such services do so as an adjunct to their main business (for example, newsagent, pharmacist, postal agent). The provision of these services most often utilises a computer system provided by a financial institution and staff merely follow a transaction process as prompted by the provided system. Furthermore, small businesses now provide money transfer transactions, which can be an overseas transfer. The level of identification needed must be reasonable for an individual to request.

What will the later identification process require and how will it operate? Internet services allow people in remote areas to trigger financial transactions without a face-to-face contact process. Even if identification is allowed later, will this require face-to-face identification? If so, this will be yet another impediment to those in rural areas being able to transact as is taken for granted by those in metropolitan areas.

CSA also notes the privacy issues that are raised by what may be seen as intrusive or extensive identification and information requests. Particularly in small communities, businesses that carry out these transactions as agents may not be considered ‘safe’ repositories of personal information. CSA strongly recommends an education program be established in preparation for these requirements being put in place, to avoid anger or embarrassment during business transactions. To assist this, all foreign persons should be notified of the minimum identification procedures that will have to be met to cash travellers cheques or transfer or receive funds during their time in Australia.

(g) Guarantees

CSA notes that Item 57 in section 6, as it is currently worded, potentially affects a much wider group of individuals than is necessary. For example, under the current provision, a parent making a payment pursuant to a guarantee of a student loan to a child would need to implement an AML program. CSA suggests that Item 57 should be expressed so that it only relates to payments made under guarantees of the type referred to in Item 56.

(h) Absence of appeals body

CSA notes that there is no provision for an appeals body should a decision taken by AUSTRAC be deemed to be unfair. In relation to prudential supervision, those supervised by APRA can appeal to the Administrative Appeals Tribunal. However, no such similar provision has been provided for in relation to AUSTRAC.

CSA recommends that an appeals body with oversight capacities be instituted, to provide for procedural fairness.

Further recommendations

(a) Timeframe for implementation

CSA recommends that a reasonable timeframe for implementation of the legislation is two years, so as not to impose unsustainable costs on business.

CSA points to the implementation timeframe for the FSR Act, which was two years, as a potential model.

(b) Consultation by AUSTRAC with business

CSA appreciates the strong consultation process that has been undertaken by AUSTRAC to this point. CSA notes that both ASIC and APRA issue proposal papers and provide for consultation periods in relation to any proposed change of legislation or rules. This practice should be followed by AUSTRAC during the transition period and once the legislation is effective.

(c) Compliance program as a risk-management process

The Bill is drafted in such a way that every reporting entity must have a AML/CTF compliance program in place covering the minimum requirements provided in the Rules. Breaches of this compliance program would appear to be treated the same as if a section of the Bill was breached, that is, as if it were law. This would appear to diverge from the concept of a risk-based process. This concept is of particular concern in the application of breach reporting and treatment by employees of SMEs.

CSA suggests that the legislation clarify that the rules are risk-based and principles-based in their approach to bringing additional businesses into a money laundering detection and prevention role. The AML/CTF program is a way of monitoring and supervising adherence to the requirements of the legislation. The provision of minimum requirements will be useful, particularly if they are provided in a format usable for small business.

(d) Fit and proper standards

In the Rules are provisions setting out requirements for employees and others to meet fit and proper standards. Those entities that are supervised by APRA and/or have an AFS Licence already have such requirements in place and reporting these to yet another regulator will just add additional costs without adding any further assurance of employees' and managers' suitability for their positions.

CSA strongly recommends that AUSTRAC recognise the fit and proper processes already in place by APRA supervised entities and AFS licensees.

CSA strongly recommends requirements for SMEs be carefully considered to reflect their limited ability to cover additional costs and, in remote areas, to access alternative staff or to obtain access to services to carry out the checks required. Any requirement will be of deep concern to those businesses that provide any designated services as a small part of their mixed businesses.

Conclusion

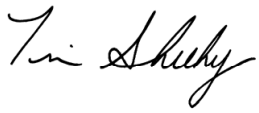
CSA believes that SMEs are likely to be strongly affected by the provisions of this Bill. CSA notes that, while large entities have compliance departments, smaller companies do not have such resources. They will, therefore, be forced to bring in external advisers to instigate the compliance process and to maintain it, or an internal resource will be seconded, placing a burden on operations. This will place unreasonable costs on smaller companies.

CSA strongly recommends that the provisions of the legislation should be implemented in the most efficacious manner, especially in consideration of the issue of costs to smaller companies.

CSA also believes that specific areas of concern will be raised and detailed by other bodies in their submissions. CSA has sought to address broad areas of concern in this submission that a careful review of the drafting can ameliorate. CSA recognises that any amendments to the legislation are subject to meeting the requirements of any conflicting overseas legislation.

CSA would welcome further contact during the consultation process and the opportunity to be involved in further deliberations.

Your sincerely



Tim Sheehy
CHIEF EXECUTIVE

AML/CTF Bill

Comments on items where a specific request for comment was made:

1 Scope of the services covered

CSA considers that using the definition of specific transactions to determine that a person is a reporting entity captures a number of businesses that will have difficulty meeting the requirements and may lead to a reduction of services, particularly in rural and regional areas, for example, money transfers by a newsagent that is an agent of Western Union, or a pharmacist that is an agent for a bank.

2 Appropriateness of the threshold in the items relating to stored value cards

CSA recommends that the threshold for stored value cards and travellers cheques be made $2,000.

3 Whether stored value cards should be treated in a similar manner to bearer negotiable bonds

CSA does not believe it is appropriate to treat these in a similar manner unless the amount that triggered such treatment for a stored value card was set at an amount such as $10,000.

4 Division 2 Section 27: comment is invited on the details of the exemption to re-identify an existing customer, as if Part 1 had been in force before the commencement of this section

No comment.

5 Some entities may not be covered by the *Privacy Act 1988*. This Bill does not impose any obligations on reporting entities to protect customer information that consists of personal information

CSA recommends that the *Privacy Act* be amended to cover any entity or person who carries out a designated service, which is covered by this Bill, irrespective of the financial size.

6 Section 58: multi-institution funds transfers - duration of period for responding to a written request from AUSTRAC for full originator information from the originating organisation within three business days if within X months of the transfer or 10 business days otherwise and similarly for the designation institution

CSA recommends five business days within one month or 10 business days otherwise.

7 Section 60: same institution funds transfers - duration of period for responding to a written request from AUSTRAC for full originator information from the originating organisation within three business days if within X months of the transfer or 10 business days otherwise and similarly for the designation institution

CSA recommends five business days within one month or 10 business days otherwise.

8 Section 73: development of the AML/CTF program within X business days of first providing a designated transaction

CSA recommends that the program should be in place before a designated transaction can be provided. For designated service providers at the time this Bill is enacted, CSA recommends a transition period of two years from that date.

9 Section 74: duration of time for AML/CTF Rules to be in effect – X months after they are registered under the *Legislative Instruments Act*

CSA recommends initially 24 months for the Rules introduced at the same time as the Bill and six months for any revisions or new Rules after that time.

10 Section 80: regular due diligence of correspondent banking arrangements – both after initial effect and for subsequent assessments

CSA does not have any comment on this timeframe.

11 Duration for the retention of customer identification records after the end of the relationship with the reporting entity

CSA recommends seven years. CSA recommends this as it is also the *Corporations Act* requirement for the retention of accounting records of transactions.

12 Sections 140, 151, 205: maximum civil penalty points – corporation and for a person other than a body corporate

CSA has no comment.